

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 10-SC-685

COMMONWEALTH OF KENTUCKY

PETITIONER

CERTIFICATION OF LAW FROM FAYETTE CIRCUIT COURT,
HONORABLE JAMES ISHMAEL, JR. PRESIDING
ACTION NO. 10-CR-0064

RICHARD DERRINGER

RESPONDENT

BRIEF FOR RESPONDENT

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of this brief for the Respondent were mailed on this 28th day of September, 2011, to the Hon. James Ishmael, Judge Fayette Circuit Court, 551 Robert Stephens Courthouse, 120 North Limestone Street, Lexington, KY 40507; to Hon. Jeanne Anderson, Assistant Attorney General, 1024 Capital Center Complex, Frankfort, KY 40601, Counsel for the Petitioner; and to Hon. Cynthia Rieker, Assistant Commonwealth Attorney, 116 North Upper Street, Lexington, KY 40507.

J. Gregg Clendenin

INTRODUCTION

This Court granted the Commonwealth’s Motion for Certification of Law regarding the clear and succinct restriction expressly set forth in KRS 532.080(2)(a) limiting Persistent Felony Sentencing to felony convictions for which a sentence “was imposed.” The Commonwealth seeks to have this Court disregard the clear and unambiguous language of that statute to include felonies for which a sentence of one year may or may not be imposed at some time in the future.

STATEMENT REGARDING ORAL ARGUMENT

Respondent agrees that oral arguments would only be necessary if the Court required them.

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RELEVANT STATUTES

The statute restricting the types of felonies that make a person eligible for Persistent Felony Offender, Second Degree Sentencing is 532.080:

532.080 Persistent felony offender sentencing

...(2) A persistent felony offender in the second degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. *As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:*

- (a) That a sentence to a term imprisonment of one (1) year or more or a sentence to death *was imposed* therefore...(Emphasis added).

KRS 533.256 establishes a series of contingencies that must be met before a final sentence can be imposed on a person who has entered a pretrial diversion agreement.

KRS 533.258 creates substantial distinctions between felonies covered by pretrial diversion agreements and ordinary felony convictions:

533.258 Effects of successful completion of pretrial diversion agreement

(1) If the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant ... shall not constitute a conviction....

(3) Pretrial diversion records shall not be introduced as evidence in any court in a civil, criminal, or other matter without the consent of the defendant.

STATEMENT OF THE CASE

Only felonies for which sentences have been imposed may be used for PFO2d sentencing. The Order of Pretrial Diversion entered in **Commonwealth v. Richard Derringer**, Jessamine Circuit Court case no. 06-CR-00292, on page 2, paragraphs "J" and "K", (Petitioner's Brief Appendix 2), expressly states that the Court "*may impose*" a sentence under certain conditions at some point in the future. Under KRS 533.256, at least eight procedural steps would have to be taken by the Jessamine Circuit Court prior to actual imposition of a sentence on the Respondent. None of those steps had been taken at the time Respondent was indicted as a Persistent Felony Offender, second degree in Fayette County. The Order of Pretrial Diversion was more interlocutory than final.

KRS 533.258(3) precludes the introduction of pretrial diversion records in "any court in a civil, criminal, or other matter without the consent of the defendant. The Commonwealth violated this statute by introducing the Respondent's pretrial diversion records in the Fayette County Grand Jury without seeking or obtaining the Respondent's consent.

ARGUMENT I

The clear and unambiguous language of KRS 532.080(2)(a), together with KRS 533.256-258, and *Peeler v. Commonwealth*, make it impermissible for the Commonwealth to seek a Persistent Felony Offender sentence enhancement for a charge covered by an unrevoked pretrial diversion agreement.

The Commonwealth argues that a guilty plea to a felony under the terms of a pretrial diversion agreement is a felony conviction the same as any other felony guilty plea. That argument ignores the plain and unambiguous language of KRS 532.080 and 533.256-258.

KRS 532.080(2)(a) only allows PFO sentencing if a sentence of one or more years “was imposed” for a prior felony. Grammatically, “was imposed” means “was already imposed.”

The Jessamine Circuit Court Order of Pretrial Diversion (Pet. Appendix 2), which the Commonwealth relied upon as a prior felony conviction to indict Respondent as a PFO2d offender, did **not** impose a sentence upon Respondent.

KRS 533.256, in fact, requires that at least eight (8) procedural steps would have to be taken before any sentence could be actually imposed on Respondent in Jessamine Circuit case.

1. A probation officer, peace officer, or victim would have to inform the Commonwealth Attorney of an alleged violation of the terms of the Pretrial Diversion Order .
2. Under KRS 533.256(1), upon receipt of such an allegation, the Jessamine Commonwealth Attorney has discretion to take no action, or
3. The Commonwealth Attorney *may* apply to the circuit court for a hearing to determine *whether or not* the pretrial diversion agreement should be voided.
4. If the Commonwealth Attorney uses its discretion to request a revocation hearing,

5. A hearing is conducted, and the Court must use the same criteria as if it were a probation revocation hearing, and the defendant would have rights as if probation revocation were being sought.
6. If the court decides to void the pretrial diversion order, the Commonwealth Attorney must make another discretionary decision about whether or not to proceed on the plea of guilty which was a part of the pretrial diversion agreement, and seek actual imposition of a sentence KRS 533.256(4)
7. If the Commonwealth opts to seek actual imposition of a sentence, the Court is not permitted to *impose* an actual sentence, even the one originally recommended in the pretrial diversion agreement, without conducting a separate sentencing hearing.
Peeler v. Com., 275 S.W. 3d 223 (2008).
8. As with all final sentencing hearings, the Court has broad discretion about imposing an actual sentence on a defendant.

The Commonwealth concedes that the Respondent's pretrial diversion agreement had not been revoked at the time that agreement was relied upon by the Fayette County Grand Jury to indict Respondent as a Persistent Felony Offender. (Pet. Brief, p. 1). Indeed, there is nothing in this record to support a conclusion that any of the necessary steps to achieve revocation of the diversion agreement had been taken, much less that a final sentence was imposed on the Respondent in the Jessamine Circuit Court.

The plain and unambiguous language of the Jessamine Circuit Court's Order of Pretrial Diversion para. "J" (Pet.App. 2), states that a sentence may be imposed at some time in the future. Paragraph "K" of that order states that under certain conditions the court may impose a 5 year sentence at some time in the future.

Since KRS 532.080(2)(a) only authorizes Persistent Felony Offender sentencing for felony convictions upon which sentences of one year or more was already imposed, and a sentence of one or more years was not already imposed on Respondent by the Jessamine Circuit Court on the date he was indicted as a Persistent Felony Offender by the Fayette County Grand Jury in the present case, the Court below properly dismissed the PFO count of the indictment.

ARGUMENT II

Under the terms of KRS 533.258, the Jessamine Circuit Court's Order of Pretrial Diversion was interlocutory and did not impose a sentence

The Commonwealth's referenced concession that the Respondent's pretrial diversion had not been revoked leaves open the possibility that the diversion might not be revoked during the 5 year period of pretrial diversion. In that event, Respondent would be entitled to have the Jessamine County charges dismissed, and under KRS 533.258, the diverted charge would not constitute a felony conviction.

If that happened, and the Respondent had already been convicted as a Persistently Felony Offender in Fayette County based on a charge that "shall not constitute a criminal conviction," what would be Respondent's remedy?

Fortunately, in the present case, the Court is not called upon to answer that troublesome question. Rather, in this case, the Court should reject the Commonwealth's interpretation of KRS 532.080 and make sure it never has to deal with voiding a Persistently Felony Offender conviction which was based on a felony that was "dismissed-diverted."

ARGUMENT III

The Commonwealth violated KRS 533.258 (3) by introducing the Respondent's pretrial diversion records to the Fayette County Grand Jury.

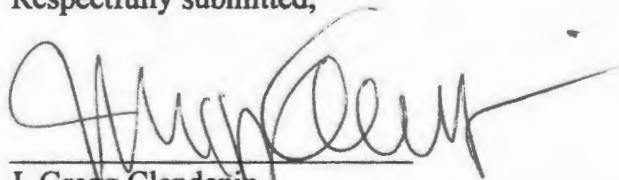
KRS 533.258(3) prohibits the introduction of the Respondent's pretrial diversion records as evidence "in *any* court in a civil, criminal, or other matter without the consent of the defendant". The statute does not limit the application of this provision to any particular category of diversion cases. In the event a diversion order is actually revoked, which had not happened in the present case, introduction of the records of the conviction that followed the revocation would obviously not be covered by this statute.

The Commonwealth introduced the Respondent's diversion records from Jessamine County at the Fayette County Grand Jury proceeding that resulted in the Respondent's indictment in contravention of KRS 533.258(3). This fact is another reason the decision of the court below should be affirmed.

CONCLUSION

The court below correctly construed KRS 532.080. Contrary to the Commonwealth's argument, a person who enters into a pretrial diversion agreement pursuant to KRS 533.250 does not have a sentence of any length imposed on him at the time his charges are approved for pretrial diversion. Since KRS 532.080 authorizes persistent felony offender sentencing for persons on whom a final sentence has already been imposed, it does not authorize an indictment under KRS 532.080 for a charge for which a final sentence has not already been imposed, and which may not constitute a felony provided certain contingencies are met.

Respectfully submitted,



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